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No. 00-52

Supreme Court, U.S.
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In The

Supreme Court of the United States

GOLD KIST, INC. and TEAMSTERS and CHAUFFEURS UNION, LOCAL 612,

Petitioners,

v.

JIMMY HOOPER, ROBERT McELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER, and JIMMY UPTAIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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§ 301 of the Labor Management Relations Act, 1947 (29 USCA § 185) .... *passim*

INTRODUCTION

This hybrid action was brought by eight mill workers employed by Gold Kist, Inc. (Gold Kist) at its Jasper Feed Mill pursuant to § 301 of the Labor Management Relations Act of 1947. Each Respondent alleged that Gold Kist breached the terms of the February 1998 contract entered into between Gold Kist and Teamsters and Chauffeurs Union, Local 612 (the Union). They further alleged that the Union, as their exclusive bargaining agent, breached its duty of good faith owed to them and all Union members.

The Petitioners, in their Petition to this Court, again attempt to divert the Court's attention away from the focal issue of the suit by arguing that the mill workers were unable to negotiate "incentive pay."

This suit, as stated and repeatedly argued by the Respondents in the Courts below, concerns a verbal "side agreement" entered into by Gold Kist and the Union in 1998 that expressly violates the terms of the written contract. By entering into this verbal "side agreement," Gold Kist breached the terms of the 1998 written contract, and the Union breached its duty to fully and fairly represent its members, including each of the named Respondents.

STATEMENT OF THE CASE

The Respondents brought suit against Gold Kist pursuant to § 301 of the Labor Management Relations Act, 1947 (29 USCA § 185), to recover damages for and to obtain an injunction against the violation of the 1998

collective written bargaining agreement, and against the Union for breach of its duty of fair representation owed to the named Respondents.

The District Court granted summary judgment in favor of Gold Kist and the Union. The Respondents appealed to the Eleventh Circuit. The Eleventh Circuit, after hearing oral argument, reversed the District Court's ruling, holding that a jury question exists as to whether Gold Kist breached the terms of the 1998 wage agreement, and whether the Union breached its duty of good faith in representing its members.

STATEMENT OF FACTS

The Petitioners have briefly stated what it considers the history of the Jasper Feed Mill. Accordingly, the Respondents find it necessary to address the long history of how Gold Kist and the Union have not only ignored and breached the terms of the 1998 agreement, but also how they have ignored the written terms of the previous contracts.

HISTORY OF VERBAL SIDE AGREEMENTS

In 1973, Gold Kist entered into an agreement with the Union to end a strike at its Jasper Feed Mill. The truck drivers had the controlling vote, and accordingly, the company offered to the truck drivers an incentive plan (additional pay for tonnage and mileage) and the feed mill employees came back to work with no gain

whatsoever. The way Gold Kist has paid the truck drivers contrary to feed mill employees, and by a verbal ***"side agreement"*** contrary to the terms of *each* contract since that time, has never been part of any three-year contract negotiations, nor contained in the terms of any actual contract entered into between the Union and Gold Kist.

In 1979, the feed mill employees filed a grievance regarding the way truck drivers are paid ***"outside"*** the contract. This grievance was never addressed. The Union has never agreed to pursue such a grievance with the response that this unwritten "side agreement" between Gold Kist and the Union is not negotiable.

Feed mill employees have long asked that any pay rates of *all* employees be included in their contracts so that employees would know what they are in fact agreeing to. These requests have been deleted, never pursued, and not negotiated.

In approximately 1989, Respondents Fred Nichols and another feed mill employee, Marc Cain, presented to Charles Parrish a grievance regarding the pay received by the truck drivers outside, and contrary to, the terms of the 1989 contract. According to Respondent Nichols, he and Marc Cain presented the grievance to Mr. Parrish and he would not accept it.

In 1992, Marc Cain asked the Union and company to write into the contract the way the truck drivers were really paid. The Union and company informed him that it was not a negotiable item. Respondent Nichols further spoke directly to the Union Business Agent, Paul Tillman,

regarding the way the truckers were paid in direct contradiction to the terms of the negotiated contract. Paul Tillman informed him that he was not going to accept such a grievance and that Mr. Nichols was wasting his time and that filing such a grievance would be just like throwing it in the garbage. This practice has been ongoing for many years pursuant to an undisclosed verbal side agreement between Gold Kist and the Union.

Marc Cain also filed a grievance against the unequal pay of truck drivers outside, above and contrary to the terms of the contract. All feed mill employees signed the grievance. Respondents Nichols and Marc Cain presented a grievance to Charles Parrish, the plant manager. Charles Parrish immediately handed it back to them and said that he was not going to accept the grievance, and that they did not have a grievance. Respondents Nichols and Marc Cain then mailed a copy of the grievance to Paul Tillman, the Union business agent. Several days later, Paul Tillman informed Respondents Nichols and Marc Cain that they did not have a grievance, and that the way the truck drivers were paid outside, above and contrary to the terms of the contract was not a negotiable item.

On October 11, 1993, the employees at the Jasper Feed Mill wrote to Mr. William A. Epperson, Vice President of Human Resources for Gold Kist. In that letter, the feed mill employees wrote that they were being discriminated against by not being given an equal opportunity for wages and benefits.

Respondents Nichols and others sent a similar letter dated January 10, 1994, addressing the fact that some employees, namely truck drivers, were being paid contrary to the terms of the contract. Mr. Epperson

responded that the Company found no evidence of unfair treatment, discrimination, or that the labor contract was being violated, and that he believed that Gold Kist was not violating any state or Federal law nor any regulations of the agencies mentioned in the letter. Of great interest, Mr. Epperson of Gold Kist stated that the Company was not free to change any terms and conditions of the labor contract, the very act by which the Respondents had filed their grievance.

The International Brotherhood of Teamsters wrote to the Respondents on June 21, 1994, and stated that the drivers receive incentive pay based upon mileage and tonnage and bonus pay for accident-free driving, while the other employees receive no bonuses, and that while such a practice on its face appeared discriminatory, it did not constitute a legal claim for discrimination.

In 1997, Union representative Larry Gilcrest informed Respondent Nichols that the unequal pay of the truck drivers outside the contract terms was not proper. However, Union business agent, Wayne Fisher, immediately informed Larry Gilcrest to be quiet, and that the unequal pay of the truck drivers outside, above and contrary to the terms of the contract was not negotiable. Union agent, Wayne Fisher, further asserted that the wage schedule was a minimum wage and that the company can pay any amount of money over that wage schedule. Respondent Nichols further noted that Larry Gilcrest visited him in the hospital in early 1998, and asked him to resign as Union steward because he was causing too much conflict.

THE 1998 CONTRACT

Gold Kist negotiated the present 1998 written contract with the Union beginning in January, 1998. Gold Kist also negotiated and entered into an undisclosed verbal "understanding" with the Union regarding the truck drivers pay *in excess of the terms of the written contract.*

As stated by Bruce Crawford, Gold Kist's Manager of Labor Relations, this practice of paying the truck drivers in excess of the written contract terms was again agreed upon by Gold Kist and the Union in direct contradiction to the terms of the 1998 contract. Nothing was ever placed on the negotiation table by which ***all*** employees subject to the contract could read and understand the terms by which only certain employees would earn income outside the contract terms.

In fact, Gold Kist has admitted that the way the truckers are paid is a ***verbal side agreement that's unwritten with the Teamsters***. Moreover, neither Gold Kist nor the Union have ever given the Respondents or the Courts a valid basis for not including the terms by which the truckers are paid in the 1998 three-year written agreement. According to Gold Kist, the Company and Union just wanted to keep it outside the terms of the contract. The Respondents were not informed of the terms of the verbal side agreement, nor invited to the secret meeting at which the separate terms were agreed upon.

These facts, alone, clearly reveal that Gold Kist and the Union together have developed a pattern by which they can avoid negotiating with all Union members, thereby satisfying certain employees by paying them

more than twice their hourly rate of pay through a verbal side agreement. The Respondents were left attempting to correct this unequal method of pay, without proper negotiations and without a grievance procedure. The verbal side agreement entered into between Gold Kist and the Union in 1998 is the essential subject of the Respondents' Complaint.

The 1998 agreement specifically states that the "Bargaining Unit" represented by the Union includes all production and maintenance employees at the Company's Jasper, Alabama, Feed Mill, including truckers. Gold Kist recognizes the Union as the sole and exclusive bargaining agent of **all employees** in the Bargaining Unit, and further, specifically states that there shall be **no individual agreements** between the Company and an employee in conflict with the agreement. The 1998 agreement makes no reference to truckers being paid in excess of the hourly wage rates contained in the agreement.

Charles Parrish, Gold Kist's Feed Mill Manager, has further testified that during the past five (5) years, neither the Union nor any of its officers have asked Gold Kist to enter into a separate side agreement with the Respondents, whereby they could similarly earn two to three times more than the wage rates contained in the negotiated contracts.

What is essentially important is that after the 1998 written contract was signed establishing hourly wages for all employees, Gold Kist and the Union then entered into their verbal side agreement whereby the truck drivers would be paid in excess of the written contract terms. After learning this, Respondent Jimmy Hooper attempted

to file a written grievance asserting that the truck drivers were being paid contrary to the terms of the 1998 contract. He submitted the grievance to his immediate supervisor, who forwarded the grievance to the Feed Mill Manager. As with the other grievances, the grievance was summarily rejected.

The Union is well aware of the verbal side agreement and, as a clear breach of its duty to represent its members, has taken no action on behalf of the Respondents. To reiterate, Gold Kist and the Union entered into a separate verbal agreement whereby the truck drivers of the Jasper plant would earn in excess of the negotiated hourly rate established in the written contract. As decided by the Eleventh Circuit, there exist jury questions as to (1) whether Gold Kist has breached the terms of the 1998 contract; and (2) whether the Union has breached its fiduciary duty to equally represent its members.

LAW AND ARGUMENT

I. GOLD KIST'S BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

The Respondents acknowledge that to prevail against either Gold Kist or the Union, the employees must show that Gold Kist breached the 1998 contract and that the Union breached its duty of fair representation. *Diaz v. Schwerman Trucking Company*, 709 F.2d 1371 (11th Cir. 1983).

In Alabama, the elements for breach of contract are: (1) existence of a contract; (2) performance by the plaintiff; (3) defendant's failure to perform; and (4) resulting damage to the plaintiff. *Southern Medical Health Systems, Inc. v. Vaughn*, 669 So. 2d 98, 99 (Ala. 1995). In the present action, Gold Kist has explicitly breached the terms of the 1998 Contract. Gold Kist has admittedly entered into a separate, secret verbal agreement with the Union regarding the truckers' pay that directly conflicts with the terms of the 1998 written agreement. Gold Kist admittedly refused to include this secret, separate "side agreement" in the contract purportedly negotiated for ***all*** employees. Gold Kist refused to negotiate the terms of this "side agreement" when negotiating the terms of the contract for ***all*** employees. Finally, after the employees attempted to contest this "side agreement" by following the terms of the contract, Gold Kist followed its historical pattern and refused to accept the grievance.

Gold Kist argues that the Respondents receive in pay what the written contract states. What Gold Kist ignores is that the truck drivers are ***not*** paid pursuant to the written contract. This contract was supposedly negotiated and binding on ***all*** parties, including the truck drivers, who are paid an amount in great excess of the contract terms. Had the truck drivers' actual secret rate of pay been included in the written contract, the mill workers most certainly would have asked the Union, their exclusive bargaining agent, to negotiate for a better hourly rate.

Essentially, Gold Kist and the Union fraudulently induced the signing of the written contract by including terms that they did not intend to follow, and have only

partially performed pursuant to the contract, by separately and verbally agreeing to pay certain workers governed by the contract an amount substantially exceeding the contract terms.

The terms of the written contract state:

(1) The Union is the sole and exclusive bargaining agent of all employees in the Bargaining Unit;

(2) There shall be no individual agreements between the Company and an employee in conflict with this agreement;

(3) Any and all previous agreements whether oral or written, by and between the Company and the Union are superseded and replaced by this agreement; and

(4) Any amendment or revision to the written contract must be approved in writing and subscribed to by all parties to this agreement.

As the facts illustrate above, Gold Kist has breached each of these terms of the contract by entering into a separate verbal agreement with the Union, for the benefit of only a certain number of employees and to the detriment of others, including the named Respondents.

Moreover, Gold Kist's breach is similar to "fraud in the inducement." The elements of fraud are: (1) a duty to speak the truth; (2) a false representation of a material, existing fact made intentionally, recklessly, or innocently; (3) action upon the false representation by the plaintiff; and (4) loss, harm, or damage proximately resulting from the false representation. *Kidder v. AmSOUTH Bank, N.A.*, 639 So. 2d 1361 (Ala. 1994).

Gold Kist represented, in negotiating and signing the 1998 written contract, the hourly wages of *all* employees. Thereafter, Gold Kist entered into a separate verbal agreement with the truckers by which they would earn exceedingly more than the hourly rate. Again, had all terms and rates of pay been properly disclosed, presented and negotiated, at issue is whether the Union would have, in good faith, properly negotiated a greater rate of pay for all employees, including the Respondents. Also at issue is whether a written contract disclosing the truckers' higher rate of pay would have been approved by all employees who voted.

Again, neither the Respondents nor the Union membership were ever given notice of the secret verbal agreement to double the truck drivers' pay, much less an opportunity to negotiate. A case cited, but incorrectly applied by the district court is found in the Seventh Circuit. In *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated, et al.*, 945 F.2d 889 (7th Cir. 1991), cert. denied, 112 S.Ct. 1951 (1992), the Appellate Court held that a secret verbal agreement between the Union and employer was not enforceable. The Union and company secretly and orally agreed to modify wage terms of the collective bargaining agreement. Reversing the district court's ruling that allowed the secret verbal agreement, the Seventh Circuit reversed holding that "grave dangers" are created by a backroom deal that is secretly negotiated between Union officials and company management without the knowledge or consent of the Union rank and file.

While acknowledging the right of the parties to verbally agree to "consistent additional terms," the Seventh

Circuit continued by addressing the issue of "whether national labor policy allows enforcement of a clandestine oral side agreement that alters fundamental terms of the written and ratified collective bargaining agreement." 945 F.2d 889, 893.

Finding that this method of altering and adding terms to a collective bargaining agreement is not proper, the Seventh Circuit held as follows:

> "[T]he laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements. Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members.
>
> . . . . Accordingly, we hold that national labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining contract."

945 F.2d 889, 894. The United States Supreme Court denied certiorari.

This is specifically the issue ignored by the district court, and the basis for the Eleventh Circuit's reversal.

As the Eleventh Circuit determined: A reasonable jury could find that paying the drivers in excess of the contract is a breach of the following contract terms:

(1) That there shall be no individual agreements between the Company and an employee in conflict with this agreement;

(2) That any and all previous agreements whether oral or written, by and between the Company and the Union are superseded and replaced by this agreement; and

(3) That any amendment or revision to the written contract must be approved in writing and subscribed to by all parties to this agreement.

Under the present circumstances, the Respondents contend that they are entitled to wages paid in direct correlation to those paid to the truck drivers pursuant to the separate, verbal side agreement.

II. UNION BREACH OF DUTY OF FAIR REPRESENTATION

The United States Supreme Court has broadly characterized the Union's duty of fair representation:

> "Under the doctrine, a union must represent fairly the interests of **all** bargaining-unit members during the **negotiation, administration, and enforcement** of collective-bargaining agreements."

International Brotherhood of Electrical Workers v. Foust, 99 S.Ct. 2121, 2125 (1979) (Emphasis added).

In the context of the grievance process, in order to establish that the Union has breached its duty of fair representation, the employee must show that the Union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith. The duty of fair representation is breached when a Union's treatment of an employee's complaint is arbitrary, discriminatory, or in

bad faith. *Vaca v. Sipes*, 87 S.Ct. 903, 909 (1967). An example would be when a Union arbitrarily ignores a meritorious grievance or is perfunctory in its procession of the grievance. *Harris v. Schwerman Trucking Company*, 668 F.2d 1204, 1206 (11th Cir. 1982). The Court in *Harris* continued, " . . . we believe that a claim that a union acted 'perfunctorily' requires a demonstration that the union ignored the grievance, inexplicably failed to take some required step, or gave the grievance merely cursory attention." 668 F.2d at 1207.

A fair representation case may also be stated against a Union for misrepresenting the terms of an agreement to its membership. *Parker v. Connors Steel Company*, 855 F.2d 1510, 1521 (11th Cir. 1988) (Reh. denied, 1988). In order to assure that this power is not abused, an exclusive bargaining agent is under a duty to represent fairly all the employees within the appropriate bargaining unit with respect to matters arising out of the collective bargaining agreement with the company.

The Union may not take actions or make rational decisions "based upon motivations such as personal animosity or political favoritism." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976). The Union's actions must further be "inclusive of a fair and impartial consideration of the interests of ***all*** employees." Id. (Emphasis added). "[A] union['s] . . . duty of fair representation . . . applies to all union activity . . . " which derives from the Union's sole representative of its members. *Air Line Pilots Ass'n v. O'Neill*, 11 S.Ct. 1127, 1130 (1991).

In this case, not only did the Union verbally and in writing continually ignore the Respondents' grievances

and fail to take any action on their behalf. Here, the Union actively participated in misrepresenting to certain members the true terms of the contract, and then entered into a separate, secret verbal agreement with Gold Kist for the benefit of only certain employees that it represented.

Again, as the Eleventh Circuit determined: "Given that the union represented both the mill workers and the drivers, it had an obligation to represent both groups fairly. A reasonable jury could conclude that the union breached its duty of fair representation by promoting and allowing a side agreement that favored the drivers."

III. RESPONDENTS EXHAUSTED THEIR CONTRACTUAL REMEDIES

Where the collective bargaining agreement contains a grievance procedure, the aggrieved worker must ordinarily exhaust his contractual remedies before bringing suit in Federal Court. *Hayes v. Renolds Metals Company*, 769 F.2d 1520 (11th Cir. 1985). This was explained by the Eleventh Circuit as follows: "[A] cause of action for breach of the duty of fair representation accrues at the point where the grievance procedure has been exhausted **or otherwise breaks down to the employee's disadvantage**." At 1522. (Emphasis added).

In *Vaca v. Sipes*, 87 S.Ct. 903, 914 (1967), the Supreme Court held that employees may sue their employer directly for breach of a bargaining agreement if the employer has effectively repudiated the grievance and arbitration process:

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contract procedures. (Citations omitted). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action. . . . An employer's repudiation may take the form of either an express refusal to abide by contractually established grievance and arbitration machinery, . . . or conduct which renders the employer unable or apparently unable to comply."

In the instant action, the Respondents have long attempted to follow the grievance procedure regarding this very issue after each negotiated contract for nearly twenty (20) years. Both the Union and the Company have routinely responded that the issue is not an issue subject to grievance.

After entering into the present 1998 contract, Respondent Jimmy Hooper attempted to file a written grievance asserting that the truck drivers were being paid contrary to the terms of the 1998 Contract. He submitted the grievance to his immediate supervisor, R.B. Casey, who in turn forwarded it to Charles Parrish, the Feed Mill Manager. Mr. Hooper filed the grievance with his immediate supervisor, and it was sent back to him. He filled it out on a Union grievance form and never did get an answer. Respondent Hooper has stated: **That's as far as it ever gets.**

Certainly, when this action was filed in February, 1998, the six-month statute of limitations had not run regarding the February, 1998 contract, and the grievance procedure has certainly broken down to the employees' disadvantage. Although the Eleventh Circuit did not specifically address this issue, the facts support the Respondents' position that Gold Kist and the Union are now estopped from attempting to assert this defense.

IV. CONCLUSION

Respondents strongly assert that the Eleventh Circuit properly determined that a reasonable jury certainly could return a verdict in their favor on the two essential allegations of their Complaint:

(1) Gold Kist breached the express written terms of the February 1998 contract entered into between Gold Kist and the Union; and

(2) The Union, as the Respondents' exclusive bargaining agent, breached its duty of good faith owed to them and to all Union members in negotiating, administering and enforcing the 1998 collective bargaining agreement, and further breached its duty to properly administer the contract's grievance procedure.

For the foregoing reasons, the Respondents respectfully request that the Court deny Gold Kist's petition for writ of certiorari.

Done this the 30th day of August, 2000.

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